In this case which was a contested one, the appellant was in the position of trust or responsibility towards the complainant being the paternal uncle. The aggravating factors were that

(i) the complainant was below the age of 16 years and therefore the offence was one of statutory rape;
(ii) though there was no evidence or further sexual indignities or preversions, the appellant harassed the complainant by strangling and pushing her down when she threatened to tell her parents; and
(iii) there would be likely subsequent negative effects of the offence on the complainant psychologically, emotionally and socially in relation to the community she belongs to.

I did not think therefore that the sentence passed was manifestly excessive or erroneous or improper in the circumstances. The learned Sessions Court Judge did consider the mitigation of the appellant and I did not find any additional mitigating point submitted by learned Counsel for the appellant during the hearing of this appeal. Learned Counsel submitted that due to the delay in reporting the incident it should be taken as a mitigating factor. He provided no authority for such a submission. Anyway, in this case I did not see how the delay could be a mitigating factor in view of the explanation for the delay given by the complainant during the trial. Accordingly I also dismissed the appeal against sentence.

HILL SAMUEL MERCHANT BANK ASIA

v.

TACKOH SDN. BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-1330-91]
24 OCTOBER 1992

PRACTICE & PROCEDURE: Summary judgment - Credit facility agreement - More than two guarantors named in the agreement - Only one of two guarantors executed the relevant guarantee document - Whether agreement remains valid - Whether triable issues raised.

This was an appeal by the defendants against the decision of the Senior Assistant Registrar granting summary judgment to the plaintiff.

The question that arose in this case was whether when there are more than two guarantors named in a credit facility agreement with the principal borrower, the said agreement remains valid when only one of the two guarantors had executed the relevant guarantee document.

Held:

[1] Whether the guarantors are entitled to rely on the non-execution of the guarantee agreement is a triable issue which may call for evidence. It is also not a matter which can be disposed of summarily.

[*Appeal allowed with costs*].

Cases listed at the end of the judgment as cases referred to:

Bhai Panna Singh v. Bhai Arjun Singh [1929] AIR 179
Khalid Panjang & Ors. Public Prosecutor (No. 2) [1964] 30 MLJ 108
Wee Wood Industries Sdn. Bhd. v. Guannex Leasing Sdn. Bhd. [1990] 2 CLJ 1060
Teguh Insurance Company Sdn. Bhd. v. Insuna Underwriting Agencies Sdn. Bhd. & 4 Ors. [1986] 2 CLJ 68 ***(foll)***
James Graham & Co. (Timber) Ltd. v. Southgate-Sands & Ors. [1985] 2 WLR 1044 ***(foll)***
Eushun Properties Sdn. Bhd. & 4 Ors. v. MBf Finance Bhd. (Supreme Court Civil Appeal No. 02-320-91)
Trengganu State Economic Dvpt. Corpn. v. Nadefinco Ltd. [1982] 1 MLJ 365

Malayan Banking Bhd. v. Yap Seng Kee & Ors. [1988] 1 MLJ 313
The Chartered Bank v. Cheviot Industries (M) Sdn. Bhd. [1988] 2 CLJ 859
Bank Bumiputra Malaysia Bhd. v. Perbadanan Kemajuan Negeri Perak [1989] 1 MLJ 502
Development Bank of Singapore Ltd. v. Yeap Teik Leong & Ors. [1988] 3 MLJ 443 ***(dist)***
Standard Chartered Bank Ltd. v. Walker and Anor. [1982] 3 All ER 938
Stadium Finance Co. Ltd. v. Helm & Anor. [1965] 109 Sol. Jo. 471 CA
Oriental Bank Bhd. v. Jaafar Sidek b. Mohd. Salam & 2 Ors. [1990] 2 CLJ 72

Legislation referred to:
Contracts Act 1950, s. 99

For the plaintiff - K.S. Mogan; M/s. Shearn Delamore & Co.
For the defendant - S. Sivaneindiren; M/s. Cheah Teh & Su

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:
A number of issues had been raised in this appeal but my considered view is that only one is worthy of further discussion at this stage and that is whether, when there are more than two guarantors named in a credit facility agreement with the principal borrower, the said agreement remains valid when only one of the two guarantors had executed the relevant guarantee document.

In the plaintiff's letter dated 2 December 1985 to the first defendant as regards the credit facility agreement offer, the paragraph on the terms for guarantees/securities reads as follows:

> *Guarantees/securities*
> This facility is to be secured by:
>
> 1. The unconditional and irrevocable joint and several guarantees of M/s. Charlie Koh Chin Tun and Tony Ang Swee Cheng and such guarantees shall be valid and enforceable in Malaysia and Singapore.
>
> 2. xxxxxxx

Section 99 of the Contracts Act 1950 had made it quite clear in the case of co-sureties that each is liable to contribute equally. The relevant provision states "Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor."

In *Teguh Insurance Company Sdn. Bhd. v. Insuna Underwriting Agencies Sdn. Bhd. & 4 Ors.* [1986] 2 CLJ 68 the relevant guarantee documents were executed by only four of the five existing directors. In that situation, the Court had decidedly declared that "As for the guarantors, apart from being able to rely on the uncertainty of the amount due and payable by the first defendants they have the additional defence, that is to say that the guarantee is not enforceable against them because of the omission of the fifth director to execute the instruments of guarantee. Whether the guarantors are entitled to rely on this is a triable issue which may call for evidence *inter alia* of the circumstances which led to the provision of the said instruments. It is also not a matter which can be disposed of summarily."

A few months earlier, the Court of Appeal in *James Graham & Co. (Timber) Ltd. v. Southgate-Sands & Ors.* [1985] 2 WLR 1044 the facts were that the plaintiff company agreed not to take proceedings against D. Ltd. on condition that a debt owed to the plaintiff by D. Ltd., together with interest thereon, was guaranteed jointly and severally by the three defendants, who were directors of D. Ltd. A deed of guarantee was drawn up and on 14 March 1980 it was received by the plaintiff, apparently signed by the three defendants. On 3 October 1980 D. Ltd. went into liquidation and the plaintiff applied to the defendants for payment. One of the directors denied having signed or having ever seen the guarantee document and on 30 October 1980 the plaintiff issued a writ against the three defendants. On 16 February 1981 judgment in default of appearance was signed against one of the defendants who was subsequently adjudicated bankrupt. Before the case came to trial the plaintiff and the first defendant learnt that the signature of the remaining director on the guarantee document was a forgery and that no one had been authorised to sign on that director's behalf. The plaintiff abandoned its claim against that director and

proceeded against the first defendant alone. At the hearing in the county Court the evidence established that the plaintiff and the defendants mutually contemplated a joint and several guarantee by the three defendants and also that the plaintiff would neither have given nor would the first defendant have accepted a guarantee to which one director was not a party. The Judge gave judgment for the plaintiff against the first defendant in the sum of £5,522. On appeal by the first defendant, it was held, allowing the appeal, that the contract of guarantee was entered into by the first defendant on the basis that all three co-sureties would be bound by it and that the effect of allowing the plaintiff's claim would be to charge the first defendant with a contract into which he had not entered; that at law there could be no binding contract unless all the anticipated parties became bound and, accordingly, the plaintiff's claim against the first defendant could not succeed.

It is also necessary to distinguish the case cited by learned Counsel for the plaintiff/ respondent namely *Development Bank of Singapore Ltd. v. Yeap Teik Leong & Ors.* [1988] 3 MLJ 443 as in that case although not all the directors had signed the guarantee, they had passed a subsequent resolution to that effect without objecting to the fact that only five directors had been required to give the guarantee.

On these considerations, disregarding the other issues the defendants had raised, my view was that there was a triable issue and I had accordingly allowed the appeal with costs against the learned Senior Assistant Registrar's decision on 21 April 1992 granting summary judgment to the plaintiff.

LEE OUI LONG

v.

LIM CHU AHIAT @ LIM CHENG SIEW & ANOR.

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[CIVIL APPEAL NO. 12-17-90]
20 JANUARY 1993

PRACTICE & PROCEDURE: Practice of mentioning on behalf of an opposing solicitor or Counsel - Whether it has legal validity.

On the date appointed for delivery of a judgment in an appeal against the decision of the Sessions Court, Counsel for the respondent addressed the Court stating that he was also "mentioning on behalf of the solicitors of the appellant."

The question which arose was whether this practice of mentioning on behalf of an opposing solicitor or Counsel has legal validity. Counsel for the respondent did not seem to be able to provide any justification or legal basis for such a practice.

Held:
[1] The practice is inappropriate, indeed undesirable. It is a device which has the effect of clogging the hearing lists, especially in the lower Courts where the practice is rampant.

[*Court not recognizing Counsel as "mentioning on behalf of the solicitor for the appellant"].*

Other sources referred to:
Practice Direction No. 6 of 1989

For the appellant - M/s. Zaman & Associates
For the respondent - M/s. Yeo Tan Hoon & Tee

JUDGMENT

Richard Talalla J:
This appeal against the decision of the learned Sessions Court Judge Kluang was heard whereafter judgment was reserved and today was appointed for delivery of the same. When the case was called out Counsel addressed the Court stating that he was appearing for the respondent and also “mentioning on behalf of the solicitors for the appellant”.

He was then asked what was meant by the expression above quoted and informed that as far as the Court could see there appeared to be